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State v. Bosier Respondent's Brief Dckt. 36631

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

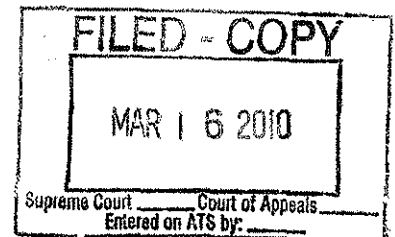
Plaintiff-Respondent,

vs.

JOSHUA LEE BOSIER,

Defendant-Appellant.

NO. 36631



BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of the Proceedings	1
ISSUE	4
ARGUMENT.....	5
I. Bosier Has Failed To Show That The District Court Was Without Jurisdiction To Amend His Judgment On Remand To Indicate Whether The Sentence Originally Imposed Should Be Consecutive Or Concurrent To Bosier's Other Sentences	5
A. Introduction	5
B. Standard Of Review.....	5
C. The Issue Of Whether The District Court Exceeded The Scope Of The Remand Is Not Preserved For Appellate Review	6
D. If Preserved For Appeal, On Remand, The District Court Followed The Directive Of The Court Of Appeals In Reinstating Bosier's Original Probation.....	7
II. Bosier Has Failed To Show That His Sentence On Remand Was Imposed In A Vindictive Manner	11
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

Cases

<u>Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201 (1989)	12
<u>H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors</u> , 113 Idaho 646,, 747 P.2d 55, (1987)	6
<u>Hummer v. Evans</u> , 132 Idaho 830, 979 P.2d 1188 (1999)	8
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 725-26 (1969),.....	12
<u>State v. Bosier</u> , 2009 Unpublished Opinion No. 439, pp. 1-2 (Idaho App., April 29, 2009)	2
<u>State v. Carlson</u> , 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000)	6
<u>State v. Cisneros-Gonzalez</u> , 141 Idaho 494, 112 P.3d.....	10
<u>State v. Clark</u> , 136 Idaho 529, 37 P.3d 26 (Ct. App. 2001)	12
<u>State v. Hale</u> , 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989)	6, 7
<u>State v. Hosey</u> , 134 Idaho 883, 11 P.3d 1101 (2000)	8
<u>State v. Kavajecz</u> , 139 Idaho 482, 80 P.3d 1083 (2003)	5
<u>State v. Knowlton</u> , 123 Idaho 916, 854 P.2d 259, 261 (1993)	6
<u>State v. Lavy</u> , 121 Idaho 842, 844, 828 P.2d 871, 873 (1992)	6
<u>State v. Lundquist</u> , 134 Idaho 831, 835, 11 P.3d 27, 31 (2000)	7
<u>State v. Mauro</u> , 121 Idaho 178, 824 P.2d 109, 111 (1991).....	7
<u>State v. McAway</u> , 127 Idaho 54, 60, 896 P.2d 962, 968 (1995)	6
<u>State v. McCutcheon</u> , 129 Idaho 168, 922 P.2d 1094 (Ct. App 1996).....	7

<u>State v. Stevens</u> , 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).....	6
<u>State v. Zichko</u> , 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)	7
<u>United States v. Goodwin</u> , 457 U.S. 368 (1982).....	12
<u>Walters. v. Industrial Indemnity Company</u> , 130 Idaho 836 949, P.2d 22 (1997)...	9

STATEMENT OF THE CASE

Nature Of The Case

Joshua Lee Bosier appeals from entry of the third amended judgment of conviction and order suspending sentence following a remand on appeal of his conviction for possession of a controlled substance.

Statement Of The Facts And Course Of The Proceedings

Bosier pled guilty to and was sentenced for possession of a controlled substance; the underlying course of proceedings was outlined by the Idaho Court of Appeals as follows:

Bosier pled guilty to felony possession of a controlled substance, I.C. § 37-2732(c). In exchange for his guilty plea, the state dismissed additional charges, including an allegation that Bosier was a persistent violator. At that time, Bosier was involved in four different criminal cases in various stages before three different courts. The district court sentenced Bosier to a unified term of seven years, with a minimum period of confinement of three years. The district court suspended Bosier's sentence and placed him on probation for seven years. The district court also ordered the sentence to run concurrently with Bosier's sentence in another unrelated case for which he had been placed on probation.

One month later, the district courts summoned Bosier for another hearing. At that time, the district court explained that it was previously under the mistaken belief that Bosier had a retained jurisdiction opportunity in one of his other cases when, in fact, jurisdiction had been relinquished. The district court then entered an amended judgment of conviction sentencing Bosier to a unified term of seven years, with a minimum period of confinement of three years. The amended judgment of conviction had the effect of revoking Bosier's probation and reinstating the sentence of the original judgment of conviction. The district court ordered the sentence to run concurrently with all other sentences currently being served by Bosier.

One week later, Bosier wrote a letter to the district court alleging that it had revoked his probation without cause and asking

the district court to reduce his sentence. The district court treated the letter as an I.C.R. 35 motion to reduce Bosier's sentence. After a hearing, the district court entered a second amended judgment of conviction modifying Bosier's sentence to a unified term of seven years, with a minimum period of confinement of two years.

State v. Bosier, 2009 Unpublished Opinion No. 439, pp. 1-2 (Idaho App., April 29, 2009).

Bosier appealed the revocation of his probation (#34745 R., pp. 57-59), asserting that the district court violated his right to due process by doing so without notice and absent a finding that he had violated any term or condition of his probation. (#34745 Appellant's brief, pp. 7-14). The Court of Appeals agreed and ordered "Bosier's first and second amended judgments of conviction for possession of a controlled substance [] vacated" and remanded the case "for reinstatement of the original probation." Id. at 3. With respect to the second amended judgment, the Court of Appeals stated

Bosier's second amended judgment of conviction which reduced the determinate portion of his sentence pursuant to Bosier's Rule 35 motion is necessarily vacated as it followed the first amended judgment of conviction which erroneously revoked Bosier's probation. Accordingly, the probation term of his original judgment of conviction is in effect, and we do not further address Bosier's argument that the district court erred by not further reducing his sentence pursuant to Rule 35.

Bosier at p. 3 n. 1.

Bosier's original judgment imposed:

an aggregate term of seven (7) years, to be served as follows: a minimum period of confinement of three (3) years, followed by a subsequent indeterminate period of custody not to exceed four (4) years with said term to run concurrently with Ada County Case No. H0400385 said term to commence immediately;

PROVIDED, HOWEVER, that this judgment shall be, and is hereby suspended, and the defendant is placed on probation for seven (7) years commencing on October 3, 2007. . . .

(#34745 R., p. 43. (emphasis and capitalization original).) Upon remand, the district court heard from the parties and, in reinstating Bosier's probation, issued a third amended judgment of conviction and order suspending sentence imposing:

an aggregate term of seven (7) years, to be served as follows: a minimum period of confinement of three (3) years, followed by a subsequent indeterminate period of custody not to exceed four (4) years with said term to run concurrently with Ada County Case No. H0400385, and to run **consecutively** to the defendant's Canyon County sentences.

PROVIDED, HOWEVER, that this judgment shall be, and is hereby suspended, and the defendant is placed on probation for seven (7) years commencing upon the defendant's release from prison.

(R., p. 12 (emphasis and capitalization original).) Bosier timely appeals. (R., pp. 18-20.)

ISSUES

Bosier states the issues on appeal as follows:

1. Did the district court lack jurisdiction in this case to alter Mr. Bosier's underlying sentence upon remand from the Idaho Court of Appeals specifically directing the district court to reinstate "the original probation" as ordered in Mr. Bosier's original judgment of conviction?
2. Did the district court err when it increased the aggregate term of Mr. Bosier's sentence through filing an amended judgment of conviction and sentence when the Idaho Court of Appeals did not vacate Mr. Bosier's original judgment of conviction and sentence?
3. Did the district court impose a vindictive sentence when it increased the aggregate term of Mr. Bosier's judgment of conviction and sentence upon Mr. Bosier's successful appeal?

(Appellant's brief, p. 5)

The state rephrases the issues as follows:

1. Has Bosier failed to show that the district court was without jurisdiction to amend his judgment on remand to indicate whether the sentence originally imposed should be consecutive or concurrent to Bosier's other sentences?
2. Has Bosier failed to show that his sentence on remand was imposed in a vindictive manner?

ARGUMENT

I.

Bosier Has Failed To Show That The District Court Was Without Jurisdiction To Amend His Judgment On Remand To Indicate Whether The Sentence Originally Imposed Should Be Consecutive Or Concurrent To Bosier's Other Sentences

A. Introduction

Bosier asserts that the district court lacked subject matter jurisdiction to amend his judgment to provide his sentence in this case would run consecutive to his Canyon County sentences where the district court failed to indicate in the original judgment whether the sentences would run consecutive or concurrent. (Appellant's brief, pp. 6-14.) Bosier's argument fails. The Court of Appeals' decision remanded Bosier's case for "reinstatement of the original probation." Bosier at p. 3. Bosier has failed to establish the Court of Appeals' directive precluded the district court from amending the judgment to provide that Bosier's sentence in this case will run consecutive to his Canyon County cases because there is no basis from which to conclude that "the original probation" was concurrent to Bosier's Canyon County sentences.

B. Standard Of Review

"A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal." State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55,

57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

The question of whether the sentence imposed is illegal is one of law, subject to free review by the appellate court. State v. Hale, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989).

C. The Issue Of Whether The District Court Exceeded The Scope Of The Remand Is Not Preserved For Appellate Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether an issue was preserved presents a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989). Bosier did not object to the district court's pronouncement at the hearing upon remand that his sentence was to run consecutive to his previously imposed Canyon County sentences and therefore did not preserve his claim of error for appellate review.

An unpreserved issue may be raised for the first time on appeal if the error claimed is fundamental. State v. McAway, 127 Idaho 54, 60, 896 P.2d 962, 968 (1995); State v. Lavy, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992).

Fundamental error has been defined as "such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." State v. Knowlton, 123 Idaho 916, 918, 854 P.2d 259, 261 (1993). An error is fundamental when it so profoundly distorts

the proceedings that it "produces manifest injustice and deprives the accused of his fundamental right to due process." State v. McCutcheon, 129 Idaho 168, 169, 922 P.2d 1094, 1095 (Ct. App 1996) (citing Lavy, 121 Idaho at 844, 828 P.2d at 873; State v. Mauro, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991)). Bosier has not claimed the action by the district court in amending Bosier's original order of probation to include the term directing his sentence to run consecutively to the Canyon County sentences rises to the level of a fundamental error.

The question of jurisdiction is fundamental, and may be brought to the court's attention at any time. State v. Lundquist, 134 Idaho 831, 835, 11 P.3d 27, 31 (2000). Bosier does assert that the district court was without jurisdiction. However, Bosier provides no authority for the proposition that the issue of a court exceeding its authority on remand is a jurisdictional issue. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.") As such, Bosier has failed to properly preserve the issue of whether or not the district court acted within its discretion to amend the judgment reinstating his original probation to reflect the court's intent that the underlying sentence run consecutively to Bosier's Canyon County sentences.

D. If Preserved For Appeal, On Remand, The District Court Followed The Directive Of The Court Of Appeals In Reinstating Bosier's Original Probation

If the issue is determined to be preserved for appeal, Bosier has failed to show that the district court acted outside its jurisdiction in amending the judgment

to reflect his sentence was to run consecutively to the Canyon County sentences. Following remand, the district court held a hearing at which it noted the original judgment failed to indicate whether the sentence was to run consecutive to or concurrent with the sentences in the Canyon County cases. (Tr., p. 6, Ls. 19-23.) The court stated its intent that the sentence be consecutive. (Tr., p. 6, L. 24 – p. 7, L. 5 (“It would be the Court’s intent, in the event that the Canyon County matter was entered as a sentence before this Court sentenced the defendant, that this sentence would be consecutive to that.”).)

Bosier argues the district court was without jurisdiction to amend the judgment to reflect the court’s intent that the sentence run consecutive to the Canyon County sentences. Specifically, Bosier asserts the order of the Court of Appeals to reinstate Bosier’s original probation left the district court with only a ministerial act and the amendment was beyond the scope of that act. (Appellant’s brief, pp. 7-9.) Bosier relies on State v. Hosey, 134 Idaho 883, 11 P.3d 1101 (2000), Hummer v. Evans, 132 Idaho 830, 979 P.2d 1188 (1999), and I.A.R. 38 in support of his jurisdictional argument. Hosey, Hummer, and I.A.R. 38 do not support Bosier’s argument that the district court acted without authority when, in reinstating Bosier’s probation, the court amended Bosier’s judgment to reflect that his sentence would run consecutive to the Canyon County sentences.

“The general rule is that, on remand, a trial court has the authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court.” Hosey, 134 Idaho at 886, 11 P.3d at 1104 (citation omitted). The Court in Hummer, in holding that the trial court was

without jurisdiction to address the issue of attorney's fees following a remand for entry of an amended judgment, noted that "[a] trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court." Hummer, 132 Idaho at 833, 979 P.2d at 1191 (quoting Walters. v. Industrial Indemnity Company, 130 Idaho 836 949, P.2d 22 (1997)). Contrary to Bosier's assertion, the district court's actions on remand were, as required by Hummer, "in conformity with" the Court of Appeals' directive. The district court reinstated Bosier's original probation.¹ While the district court also amended the judgment to address a matter previously overlooked -- the consecutive or concurrent nature of Bosier's sentence as it related to his previously imposed Canyon County sentences -- such amendment merely addressed an issue subsidiary to and in conformity with the act of reinstating Bosier's probation as directed by the Court of Appeals. Bosier has failed to establish otherwise.

Bosier's argument that amending the judgment to reflect whether his sentence was consecutive or concurrent with his Canyon County sentences fails. The Court of Appeals did not reach, nor was it presented, any claim having to do with the concurrent or consecutive nature of the sentence. On the contrary, the court ultimately concluded only that Bosier was entitled to reinstatement of his probation. Once that is accomplished, Bosier has received the full benefit of the Court of Appeals' order. Whether his sentence runs concurrently or

¹ Bosier argues and the state concedes that the district court erroneously amended the judgment to modify the start date of Bosier's probation in this case. The judgment should therefore be amended to include the original language that Bosier's probation commenced on October 3, 2007.

consecutively **if that probation is violated** is merely subsidiary to the Court of Appeals' mandate.

Bosier's argument on appeal appears to rely on the premise that the original judgment vested a right to have this sentence run concurrent to the Canyon County sentences. Bosier has failed to cite to any authority that he was entitled to such a presumption. Absent such a showing, the district court had the authority to impose a consecutive sentence and did not lose jurisdiction on remand to do so.² See State v. Cisneros-Gonzalez, 141 Idaho 494, 112 P.3d 782 (2004) (Idaho courts have a common law discretionary power to impose sentences cumulative to those previously imposed).

Because Bosier has failed to show that he had the presumption of a concurrent sentence, he has failed to show that the district court acted outside of the authority given it by the Court of Appeals on remand to amend the judgment

² Bosier also relies on I.A.R. 38 in support of his jurisdictional argument, however, such reliance is also misplaced. As it relates to the issuance of remittiturs, the rule provides:

When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and to the presiding district judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion.

I.A.R. 38 (c). Bosier incorrectly asserts that the district court was in violation of the provisions of I.A.R. 38 because "[i]nstead of performing the task directed to it" by the Court of Appeals, the "district court unilaterally determined that it wanted to sentence Mr. Bosier anew." (Appellant's brief, p. 10.) Because the district court did in fact comply with the directive of the opinion issued by the Court of Appeals by reinstating Bosier's original probation, Bosier's claim that the district court violated Rule 38 also fails.

reinstating his original probation to reflect the court's intent that Bosier's underlying sentence run consecutive to his Canyon County cases.

II.

Bosier Has Failed to Show That His Sentence On Remand Was Imposed In A Vindictive Manner

Bosier asserts for the first time on appeal that the same district court judge who originally sentenced him impermissibly increased his sentence because Bosier was successful on appeal. (Appellant's brief, pp. 16-17.) Initially, it is the state's position that Bosier has failed to properly preserve this issue for appeal by failing to raise it in front of the district court, which was in the best position to outline the reasons other than vindictiveness, if present, that any perceived increase in Bosier's sentence occurred. Carlson, 134 Idaho at 398, 3 P.3d at 76 ("It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.").

If the court does conclude that Bosier's claim that his sentence upon remand was imposed in a vindictive manner has been properly preserved for appeal, the only remaining issue for this Court to determine based on the state's earlier concession that the extension of Bosier's probationary period by almost two years was improper, is whether the pronouncement that Bosier's sentence run consecutive to the sentences previously imposed in the Canyon County cases in accordance with the district court's intent was an increase of Bosier's sentence done for the purpose of punishing Bosier for exercising his right to an appeal. Bosier has failed to show that the sentence he received on remand was a harsher sentence motivated by his successful appeal.

A court violates a defendant's constitutional due process rights when it imposes a heavier sentence "if the motivation for the heavier sentence was to penalize the defendant" for exercising his rights. State v. Clark, 136 Idaho 529, 531, 37 P.3d 26, 28 (Ct. App. 2001) (citing North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969), *rev'd. in part* Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989)). Where the sentence is harsher, there is generally a "presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." Clark, 136 Idaho at 531, 37 P.3d at 28 (quoting United States v. Goodwin, 457 U.S. 368, 374 (1982)).

Bosier fails to support his assertion that the district court sought to increase his sentence after a successful appeal. As explained above, the district court did not, in fact, increase Bosier's sentence on remand. The amendment to the reinstatement of Bosier's original probation merely effectuated the district court's intent to run the underlying sentence consecutive to the previously imposed Canyon County cases. Running the sentence consecutively did not actually increase the length of the sentence. As such, Bosier has failed to establish a claim of vindictiveness.

CONCLUSION

The state respectfully requests that this Court uphold the district court's third amended judgment of conviction in all respects except the condition providing for commencement of probation upon Bosier's release from prison.

Dated this 16th day of March, 2010.



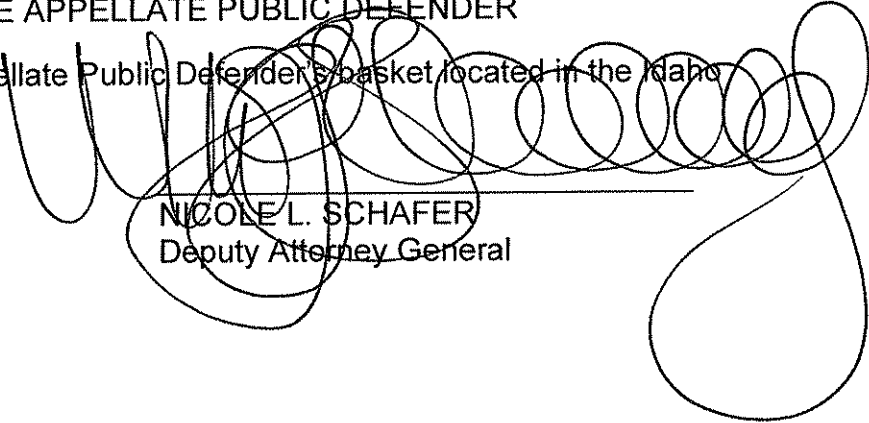
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of March, 2010, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER
Deputy Attorney General